PATTON BOGGS LLP
ATTORNEYS AT LAW

2550 M Street, NW
Washington, DC 20037-1350
202-457-6000

Facsimile 202-457-6315
www.pattonboggs.com

June 7, 2001

Benjamin L. Ginsberg
202-457-6405
bginsberg@pattonboggs.com

VIA COURIER

Mr. Jeff S. Jordan
Supervising Attorney
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 5199 Bush-Cheney 2000, Inc.
and David Herndon, as Treasurer

Dear Mr. Jordan:

Enclosed is the response of our client, Bush-Cheney 2000, Inc. and David Herndon, as Treasurer (collectively "Bush-Cheney"), to the complaint filed by the Democratic National Committee ("DNC") in the above referenced matter.

In a related but separate matter, the Federal Election Commission ("Commission") is currently auditing Bush-Cheney pursuant to 26 U.S.C. § 9007(a) and has subpoenaed financial information concerning recount activities. Bush-Cheney is prepared to respond to that subpoena as of today, nearly two-weeks before the due date. Pursuant to the terms of the subpoena and as discussed with Commission staff on Tuesday, June 7, 2001, the documents are now available for inspection at the site of the audit.

The enclosed response to the DNC's complaint and compliance with the Commission's subpoena in the Bush-Cheney audit should not be interpreted as a waiver of Bush-Cheney's motion that the Commission stay MUR 5199's proceedings pending the completion of the audit. We reserve the right to supplement this response pending the Commission's decision on the motion. We look forward to prompt notification of the Commission's decision.

Please do not hesitate to call us with any questions.

Respectfully submitted,

Benjamin L. Ginsberg
William J. McGinley

Enclosure

CC: Albert R. Veldhuyzen, Esquire

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter Of	)	
	)	MUR 5199
Bush-Cheney 2000, Inc	)	
and David Herndon, as Treasurer	)	

RESPONSE OF BUSH-CHENEY 2000, INC. AND DAVID HERNDON, AS TREASURER TO THE COMPLAINT FILED BY THE DEMOCRATIC NATIONAL COMMITTEE

Introduction

Since there has not been a presidential recount since 1876, there are no Federal Election Commission precedents concerning a recount involving a publicly-funded presidential campaign. The Federal Election Campaign Act of 1971, as amended (the "Act"), the Presidential Election Campaign Fund Act (the "Fund"), the Commission's regulations and its advisory opinions do not require the reporting of the receipts and disbursements of a fund established by a publicly-funded Presidential campaign for recount purposes. Further, the Commission's precedents from the 1996 presidential campaign audits limit a presidential campaign's ability to rely on advisory opinions to fill gaps in the regulatory regime. *See* Commissioner Darryl R. Wold, *et. al*, *Statement of Reasons for the Audits of the Dole and Clinton Presidential Campaigns* 2-4 (June 24, 1999) ("*Statement of Reasons*"). Indeed, the complaint filed by the Democratic National Committee, whether deliberately to score political points or inadvertently through oversight, omits both the plain wording of the regulations and the plain wording of the Commission's advisory opinions. For the reasons set forth below, the DNC complaint is without legal merit and must be dismissed.

Statement of the Facts

In the wake of the unprecedented Presidential recount following the November 7, 2000 election, Bush-Cheney 2000 formed the Bush-Cheney Recount Fund ("BCRF" or "Fund") in order to raise funds and pay costs associated with the recount and election contest. The Fund was established in mid-November as a part of Bush-Cheney 2000. No monies associated with the BCRF were either raised or expended to finance activities that constituted qualified campaign expenses or activities permitted to be paid for by the General Election Legal and Accounting Fund ("GELAC"). Further, BCRF has made all records of the recount requested by the Commission available to the Commission's staff.

Legal Analysis

A. Even if Governed by the Federal Election Campaign Act, Donations to and Disbursements By Recount Committees are Specifically Exempted By the Plain Wording of the Regulations From What Must Be Reported.

Donations to and disbursements by a fund established by a publicly-funded presidential campaign are specifically exempted from the definition of contribution and expenditure. 11 C.F.R. § 9002.13 provides that the definition of "contribution" under the Fund is subject to "the same meaning given the term under 2 U.S.C. §§ 431(8), 441b and 441c, and under 11 C.F.R. §§ 100.7 and 11 C.F.R. parts 114 and 115." *See also* 11 C.F.R. § 9001.1. These regulations include specific exemptions for donations to and disbursements by recount funds. 11 C.F.R. §§ 100.7(b)(20)("[A]nything of value made with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election, is <u>not</u> a contribution except that the prohibitions" on sources of funds apply.) & 100.8(b)(20))("[A]nything of value made with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election, is <u>not</u> an expenditure except that the prohibitions" on sources of funds apply.) (emphasis added).

Further, since the regulatory definition of "qualified campaign expense" expressly incorporates the term "expenditure", recount disbursements are specifically exempted. *See id.* § 9002.11(a)(1) ("[A]ny expenditure, including a purchase, payment, distribution, loan advance, deposit or gift of money or anything of value") (emphasis added).

Accordingly, there is no requirement that a separate account established solely for recount purposes within a publicly-funded presidential campaign report its receipts and disbursements. The recordkeeping and reporting regulations applicable to these campaigns require the reporting of "all expenditures" and "contributions or loans." *Id.* § 9006.1 (emphasis added). Further, the reporting regulations do not address or require the reporting of recount activities. *See id.* § 104 *et. seq.* Thus, not only do neither the statute or the Commission's Regulations contain a requirement that donations to and disbursements by a recount fund be included on a Committee's Reports of Contributions and Disbursements, the Commission's Regulations include specific exemptions for donations to and disbursements by a fund established for recount purposes.

B. Publicly-funded presidential Campaigns Are Materially Distinguishable From Privately-funded Senatorial and Congressional Campaigns.

Presidential campaigns which receive funding from the Treasury of the United States operate under their own statutory scheme and implementing regulations that make their operation different from campaigns for the United States Senate and House of Representatives. *See* 26 U.S.C. §§ 9001 *et seq.* This unique statutory and regulatory scheme and the receipt of public funding make these campaigns materially distinguishable from a congressional or senatorial campaign that is funded by private donations. *C.f. Colorado Republican Federal Campaign Comm'n v. FEC*, 518 U.S. 604, 611-612 (1996). There is nothing in the statute, regulations or advisory opinions governing presidential campaigns that would require these campaigns to report the activity of any fund established for recount purposes.

C. **Under the Precedent Established During the Commission Audits of the 1996 Presidential Campaigns, Advisory Opinions Such as Those Cited By the DNC Complaint Cannot Be Binding on a Presidential Recount Fund or Used to Fill Gaps in the Regulatory Scheme.**

The DNC complaint relies on two advisory opinions issued by the Commission to privately-financed senatorial campaigns concerning their recount funds. *See* FEC AOs 1978-92 & 1998-26. While these Advisory Opinions are miscited by the DNC, they cannot in any instance serve as precedent for the Bush-Cheney Recount Fund involving a publicly-funded presidential campaign.

The courts, and the Commission itself, have held that advisory opinions are not binding on entities and individuals who are materially distinguishable from the recipient of a Commission advisory opinion. As the Second Circuit Court of Appeals stated:

> Advisory Opinions are binding only in the sense that they may be relied on affirmatively by any person involved in the specific transaction or activity discussed in the opinon or in material indistinguishable transaction or activity. . . . On the other hand, to the extent that an advisory opinion does not affirmatively approve a proposed transaction or activity, it is binding on no one – not the Commission, the requesting party, or third parties.

Statement of Reasons 3 (citing *United States Defense Comm. v. FEC*, 861 F.2d 765, 771(2nd Cir. 1988)) (omissions in original) (citations omitted).

The Commission itself reached the same conclusion in its statements of reasons on the audits of the Dole and Clinton presidential campaigns (June 25, 1999). In the *Statement of Reasons*, a majority of the Commission held: "Congress included an express prohibition in the FECA against the Commission using advisory opinions to establish rules of conduct." *Id.* at 2, (citing 2 U.S.C. § 437f). Moreover, the majority of the Commission held:

> As a result, the Commission may not use advisory opinions as a substitute for rulemaking. Rulemaking is not simply the preferred method for filling gaps in the FECA. It is the required method. Where the law is of uncertain application, advisory opinions cannot be used as a sword of enforcement. . . . This reading of FECA's rulemaking requirements, of course, does not prevent the Commission from enforcing FECA in novel or unforeseen circumstances. It only requires that, absent controlling regulations or authoritative interpretation of the courts, the Commission's enforcement standard [must] [sic] be the natural dictate of the language of the statute itself.

Statement of Reasons 3 (citations and quotations omitted) (emphasis added). Accordingly, since the Act and Commission regulations contain no requirement that donations to and disbursements by a recount fund established by a publicly-funded presidential campaign be reported, advisory opinions cannot be relied upon by such campaigns for guidance nor can they be used as the basis for proceeding with an enforcement action or finding a violation against a presidential campaign.

D. Even if the Commission Did Apply the Advisory Opinions, the DNC Complaint Omits the Plain Wording of the Holding of AO 1978-92 that Specific Disbursements of a Recount Fund Do Not Have to Be Reported.

While the DNC Complaint makes much of Advisory Opinions 1978-92 and 1998-26, it conveniently omits the dispositive language of AO 1978-92 concerning what would be reportable transactions by a recount fund established as part of a political committee, such as BCRF. Even if the receipts and disbursements of BCRF were found to be "reportable transactions", and they are not, it is clear that AO 1978-92 calls for reporting nothing like what the DNC asserts.

> Disbursements made by the ... Committee for recount purposes although not "expenditures" must also be included in the report filed for the period when the disbursements are made, since the regulations state that reports filed shall include "all receipts and disbursements" occurring within the period covered by the report. 11 C.F.R. § 104.2(b)(7). Details such as identification of the payees and dates of each payment need not be itemized in the filed report; however, the total amount disbursed must be stated with an explanation that the amount was paid for expenses incident to a vote recount of the ... election.

AO 1978-92 at 3 (emphasis added). This means that a campaign committee reporting recount activities is required to report only the aggregate amount of recount disbursements. It is not required to itemize such disbursements, contrary to the DNC's assertions.

This absence of a requirement to report individual transactions of a recount fund is, of course, consistent with the regulations' specific exemptions of donations to and disbursements by a recount fund from the statutory definitions of "contribution" and "expenditure".

Even under the Commission's inapplicable advisory opinions miscited by the DNC, BCRF never had an obligation to report individual disbursements made by its recount fund. Indeed, the amount raised and the sources of its receipts (and thus implicitly a cap on the amount spent) were widely and accurately reported in the media and were publicly available on the campaign's web site. Accordingly, BCRF has publicly disclosed on its web site and through the media the financial information disclosed by privately-funded congressional and senatorial campaigns pursuant to the Commission's advisory opinions.

Conclusion

The receipt and spending of funds by a publicly-funded presidential campaign for recount purposes are, by definition, not federal election activity under the Act, Fund or Commission regulations. The recordkeeping and reporting regulations applicable to these campaigns require only the reporting of contributions and expenditures. A separate account within a campaign organization established solely for recount purposes is not required to report its receipts and disbursements. Therefore, the holdings in Advisory Opinions 1978-92 and 1998-26 do not effect the reporting requirements applicable to publicly-funded presidential campaigns because they are materially distinguishable, both legally and factually, from privately-funded senatorial and congressional campaigns.

For the reasons set forth above, there is no legal basis for proceeding with this matter and the Commission should dismiss the DNC's complaint in its entirety.

Respectfully submitted,

Benjamin L. Ginsberg
William J. McGinley

Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037
(202) 457-6000

Doc. 625128